

PD-0366-17

PD-0366-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/20/2018 4:37 PM
Accepted 6/21/2018 10:08 AM
DEANA WILLIAMSON
CLERK

**IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS**

FILED
COURT OF CRIMINAL APPEALS
6/21/2018
DEANA WILLIAMSON, CLERK

SAMUEL UKWUACHU,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

No. PD-0366-17

APPELLANT'S MOTION FOR REHEARING

Respectfully submitted,

WILLIAM A. BRATTON, III
Attorney at Law
Two Turtle Creek Village
3838 Oak Lawn Ave. Suite 1124
Dallas, Texas 75219
(214) 871-1133 office
(214) 871-0620 fax
State Bar No. 02916300
ATTORNEY FOR APPELLANT
(ON APPEAL ONLY)

**IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS**

SAMUEL UKWUACHU,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

No. PD-0366-17

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW **SAMUEL UKWUACHU**, Appellant in the above-entitled and numbered cause, by and through his attorney of record, **WILLIAM A. BRATTON, III**, and files this Motion for Rehearing, requesting the Court to reconsider the opinions previously rendered on June 6, 2018.

I.

The Court's plurality decision, joined by four (4) judges, incorrectly reversed the Court of Appeals' decision and remanded the case to the Court of Appeals for the Tenth District by holding that the text messages of the complaining witness were properly excluded from consideration by the jury based on a holding that under Tex. R. Evid. 412 error was not preserved and that their denial of admissibility pursuant to Tex. R. Evid. 107 was not an abuse of discretion by the trial court.

II.

The Court's concurring decision, joined by two (2) judges, incorrectly concurred in the reversal the Court of Appeals' decision and the remand of the case to the Court of Appeals for the Tenth District by holding that under Tex. R. Evid. 412 and 107 the text messages of the complaining witness were admissible, but their exclusion from consideration by the jury by the trial court was harmless.

III.

The Court's concurring decision, joined by three (3) judges incorrectly concurred in the reversal the Court of Appeals' decision and the remand of the case to the Court of Appeals for the Tenth District by holding that under Tex. R. Evid. 412 and 107 the text messages of the complaining witness were inadmissible.

The Court's plurality opinion on State's Petition for Discretionary Review, joined by four (4) judges, held that evidence of a text message by the complaining witness (hereinafter, "CW") and Celine Antwi, her friend, were properly excluded from the jury's consideration by the trial court. The plurality opinion held that any issue under Tex. R. Evid. 412 was not preserved by the proceedings in the trial court and only Tex. R. Evid. 107 was at issue on the messages' admissibility. In reviewing the admissibility under Tex. R. Evid. 107, the plurality opinion held that the messages at issue were part of an ongoing conversation subject to Tex. R. Evid. 107 but the trial court's determination to exclude was not an abuse of discretion. (Plurality Opinion P. 7).

The Court's concurring opinion on the State's Petition for Discretionary Review, which was joined by two (2) judges, held that the text messages between the C.W. and Celine Antwi were

properly admissible under Tex. R. Evid. 412, but the trial court's decision to exclude them from the jury's consideration was harmless. (Concurring Opinion P. 13-14).

Finally, the Court's concurring opinion on State's Petition for Discretionary Review, which was joined by three (3) judges, held that the text messages between the C.W. and Celine Antwi were properly excluded from the jury's consideration under Tex. R. Evid. 412(b)(3). This decision was based upon the opinion not being able to determine the factual meaning of the text messages. (Concurring Opinion P. 22).

At 2:16 a.m. on October 20, 2013, C.W. had a text conversation with Celine Antwi. During that conversation, C.W. advised Ms. Antwi that she was going to "chill with Sam." (R.R.VI Ct.Exh. 1). Ms. Antwi responded to C.W. to be careful and "wrap it up this time." (R.R.VI Ct.Exh. 1). C.W. then texted Ms. Antwi regarding another after party occurring that they might attend. (R.R.VI Ct.Exh. 1). C.W. told Ms. Antwi that the Appellant didn't want to go to the party and Ms. Antwi responded that was because the Appellant wanted "to hit." (R.R.VI St.Exh. 1). Approximately twenty minutes passes before the text messaging between C.W. and Ms. Antwi resumes, with C.W. telling Ms. Antwi that she wanted to go home. (R.R.VI Ct.Exh. 1). During this portion of the resumed text messaging, C.W. stated that the Appellant had "just raped me basically". (R.R.VI Ct.Exh. 1).

During her direct examination, C.W. testified to the text message that she sent to Celine Antwi where she stated that she was "basically raped". (R.R.V 163). Prior to cross examination by the Appellant, the court conducted a hearing, under Tex. R. Evid. 412 outside the presence of the jury, regarding the text messaging between C.W. and Ms. Antwi. (R.R.VI). During that

hearing, the court admitted Court's Exhibit 1 which was a copy of the text messaging between C.W. and Ms. Antwi. (R.R.VI 13).

The Appellant urged that the entire conversation should be admissible to the jury and not be limited to that portion that was admitted during C.W.'s direct examination. (R.R.VI 13-21). The basis of the Appellant's offer of proof was that the entire conversation would put the conversation between C.W. and Celine Antwi in context under the rule optional completeness Tex. R. Evid. 107. (R.R.VI 13-21). The State argued that it was not the same conversation and that Tex. R. Evid. 107 would not apply. The court ruled that the conversation was separated in time and denied the offer of proof by the Appellant. (R.R.VII 5).

The issue regarding the text messages admissibility was raised at trial during a Tex. R. Evid. 412 hearing. The portion of the Clerk's Record recording the hearing on the text messages admissibility was under seal with the District Clerk. The issue was presented to the Court of Appeals for the Tenth District, pursuant to an order of the Court of Appeals, under seal and briefed separately. The oral argument presented to the Court of Appeals for the Tenth District was conducted in camera before the court. The Court of Appeals for the Tenth District's opinion held that Tex. R. Evid. 412 controlled the admissibility of the text messages and Tex. R. Evid. 107 required their admission.

The Court of Criminal Appeals' opinions have all nine (9) judges holding that the text messages were a continuing conversation between C.W. and Celine Antwi. The Court of Criminal Appeals' opinions have a majority of the Court, five (5) judges, holding that Tex. R. Evid. 412 is applicable to the admissibility of the text messages. The Court of Criminal Appeals' opinions have five (5) judges holding that the text messages could/would be admissible pursuant to Tex. R. Evid.

412 (b)(2)(B). The Court of Criminal Appeals' opinions have all nine (9) judges holding that Tex. R. Evid. Does not preclude the text messages' admissibility.

The opinion of the court, joined by four (4) judges, stated that the Court of Appeals incorrectly reviewed the admissibility of the text messages de novo and held that their exclusion, considering only Tex. R. Evid. 107, was not an abuse of discretion since there was no showing of their necessity to explain the portion of the conversation admitted into evidence. The opinion of the Court, joined by three (3) judges, reviewed the text messages de novo to hold the messages inadmissible under Tex. R. Evid. 412 (b)(2)(B) due to their ambiguous meaning and that the determination of admissibility pursuant to Tex. R. Evid. 412 would "trump Rule 107's rule of inclusion". Finally, the opinion of the Court, joined by two (2) judges held that the text messages were admissible under Tex. R. Evid 412 (b)(2)(B), but their exclusion from evidence was harmless due to their exclusion "did not prevent the Appellant from presenting the substance of his defense to the jury". The excluded text messages only tended to prove consent by implication that the Appellant and C.W. had consensual sex in the past and only weakly supported the Appellant's defensive theory.

The opinions of the Court on State's Petition for Discretionary Review are completely contradictory in their holdings. If the order to remand the case to the Court of Appeals stands, what is the instruction to that court? A majority of the Court of Criminal Appeals holds that Tex. R. Evid. 412 applies to the issue. A conflict exists between the court in the opinions as to a review of the text messages de novo to determine admissibility. The existence of the meaning of the text messages that are in "black and white" in the record exists in the opinions. Finally, the relationship between Tex. R. Evid. 412 and 107 is in conflict.

The Courts' opinions on State's Petition for Discretionary review effectively hold the appellate courts are in a better position to determine the meaning of uncontroverted evidence than a jury. There is no holding that the text messages would create unfair prejudice. The opinions instead, by a majority, hold the messages relevant. If the majority of the judges joining in the Court's opinions find that Tex. R. Evid. 412 controls admissibility, what would this mean to the decision of four (4) judges who did not consider the rule as to their admissibility? If a de novo review of the messages for determining admissibility is improper, what would that mean to the opinion of three (3) that held the messages ambiguous?

The Appellant would show that the factual basis used by the various judges in holding the messages at issue between C.W. and Celine Antwi are conflicting and require a rehearing. The opinions create uncertainty and prevent the parties and the Court of Appeals for the Tenth District from receiving guidance in future proceedings.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Motion for Rehearing be in all things GRANTED.

Respectfully submitted,

/s/WILLIAM A. BRATTON III

WILLIAM A. BRATTON, III

Attorney at Law

Two Turtle Creek Village

3838 Oak Lawn Ave. Suite 1124

Dallas, Texas 75219

(214) 871-1133 office

(214) 871-0620 fax

State Bar No. 02916300

Email – bill@brattonlaw.com

ATTORNEY FOR APPELLANT

(ON APPEAL ONLY)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing has been forwarded to the District Attorney of McLennan County on this the 20th day of June, 2018.

/s/WILLIAM A. BRATTON III
WILLIAM A. BRATTON, III
ATTORNEY FOR APPELLANT
(ON APPEAL ONLY)